WV's Chesapeake Bay
Watershed Implementation Plan

Phase 1 Public Comment Responses

February 22, 2011

West Virginia's General Response

WV submitted a final Phase I Watershed Implementation Plan on November 29, 2010 that meets the West Virginia cap loads for nitrogen, phosphorus and sediment. The WIP has been approved by the Environmental Protection Agency. EPA has made a determination of WVs' reasonable assurance, reinforced the WIP with backstops, and documented that in the TMDL. WV will further consider the reasonable assurances in the Phase II WIP. The charge outlined by EPA was for WV's WIP to focus only on nitrogen, phosphorus and sediment allocations described in the Chesapeake Bay TMDL. Future West Virginia TMDLs will address issues related to local water quality as necessary or appropriate. The final WIP can be viewed at http://www.wvca.us/bay/documents.cfm

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Each Bay State has a legal obligation to ensure that it does not contribute to a downstream violation of water quality standards. Unfortunately none of the draft WIPs has met EPA expectations and none has been found to be sufficient to ensure that upstream states do not contribute to violations of Maryland's water quality standards. Maryland's draft WIP met its jurisdiction-wide target allocations for nitrogen and phosphorous and sediment. Maryland urges all states to meet the jurisdiction wide target allocations and revise its WIP to identify pollution reduction programs sufficient to meet EPA allocations.

See WV's general response

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In 2002, Governor Bob Wise signed a formal agreement to work with other jurisdictions to "achieve the nutrient and sediment reduction targets… to achieve the goals of a clean Chesapeake Bay by 2010." In 2005 West Virginia issued its own Tributary Strategy and explicitly recognized that failure to achieve the necessary load reductions would result in the development of the TMDL. WV has been a full and cooperative participant in this process which has led to the development of the TMDL.

Many of WV's waters within the Potomac watershed are listed as impaired due to unhealthy benthic macro invertebrate communities or high levels of fecal coliform bacteria. West Virginia's responsibility to develop an adequate WIP that meets the Bay TMDL allocations and provides reasonable assurances of required pollution reductions is founded on the firm requirement of federal law.

CBF agrees with EPA's assessment of WV's draft WIP.

- More details on how loads from new development will be tracked **(WIP Section 7D.f. on p. 41 [formerly 10.f.] was revised between Sept. 1 and Nov. 29, 2010) and offset (WIP Section 7D.b. on p. 37 [formerly 10b], was revised between Sept. 1 and Nov. 29, 2010) and specific information on permit limit requirements (WIP Appendix A.1 and Section 6B, p. 21) and compliance schedules (WIP Appendix A.2: columns M-U)** for wastewater treatment plants
- Strengthen the section dealing with achieving the needed reductions from agriculture which contribute the vast majority of the state's loads **(WIP Section 8, beginning on p. 55, was revised between Sept.1 and Nov. 29, 2010)**
- Must specify more details on how agriculture BMP implementation will be accelerated through enforceable or otherwise binding measures **(WIP Section 8 and EPA's backstop)**

See WV's general response

CBF supports the recommendation to revise the state's phosphorus index and urges WV to work with other scientists in the Bay to come up with a regional approach that is protective of water quality.

West Virginia is committed to revising the state's phosphorus index when funding is identified. See WIP p. 91.

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Potomac River Keepers strongly disagrees with the approach WV has taken to address nutrient loading reductions. We specifically or [sic] disagree with:

- The voluntary agriculture practices focusing on Jefferson and Berkeley counties
- WV requesting to exchange excess phosphorous for a reduction in the nitrogen load
- The use of nutrient trading as a key component for future offsets

Many of the rivers and streams in the Potomac watershed continue to suffer from excessive nutrients and USGS has found intersex fish in sections of the South Branch Potomac, Potomac main stem, Shenandoah and the Susquehanna.

West Virginia's WIP should:

- Provide any information on how WV will assess the effectiveness of and compliance with voluntary programs **We have done this where we have deemed possible.**

- Develop nutrient TMDLs that set caps for nitrogen and phosphorus for both point and nonpoint sources **See WV's general response**
- Increased enforcement of NPDES permits for current and future violations **Enforcement staff has been increased**
- Include insignificant facilities nutrient loads in the final WIP **They are included in section 6B (p. 21) and 6E (p. 25) and Appendices A.4 and B.2**
- Require and make available to the public Nutrient Management Plans from all farms
  Farm operators who participate in nutrient trading would agree to the following stated characteristic of the trading program:
  "e) Transparency. A registry of credits generated and verification records will be maintained and made publicly available as part of the NPDES permit process." (p. 84) In addition CAFO permit records are public information.
- Require all dairy and beef operations to fence animals out of the stream **See WV's general response**
- Address possible sediment reductions and not equate mining activity to forestry loadings **See WV's general response**
- Hire more inspectors and work with local government to deal with regulated stormwater **Both suggestions are already being done.**
- Consider the non-regulated stormwater contingencies for two year milestones **See WV's general response**
- The nutrient exchange should not take place because if the model is set up to provide a fair share of the nutrient load reduction between the states there should be no give on the required load reductions. The ecological effect of N and P are very different and N has a higher delivery ratio so more N will go to the Bay.
- WV should not support trading because it is not sustainable and will create an unfair balance of unhealthy streams in lower income and growth areas and there is no accountability system that can guarantee credit will result in actual nutrient uptake as opposed to estimated uptake

See WV's general response

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EDF realizes that West Virginia faces significant challenges in delivering agricultural nutrient reductions and feels WV will benefit most from strategies that can deliver greater reductions from existing investments. Their recommendations focus on three key opportunities:

- Move away from one size fits all nutrient management planning and support On-Farm Network collaboration to evaluate nutrient recommendations and make field- specific improvements with documentable benefits.

Plans are written based on field-specific data, sometimes even grid-specifi,c that includes current manure analysis, current soil analysis, Productivity Class (Based on: soil type, slope class and hydrologic grouping), Phosphorus Site Index and crop being grown or crops being rotated. The WV P-Index requires field-specific improvements such as no-till & crop rotations, contour strip cropping, grassed waterways, and application set-backs for fields rated "High". If fields are low or medium risk then the producer is already properly managing the field. Best management practices are also applied to help control sediment and nutrient run-off/leaching in different cropping systems. Plans are updated every three years to see what changes "if any" are needed for the plan.

  - Revise guidelines and payment structures of the state nutrient management programs to one based on evaluation, adaptation, and improvement and advocate for similar changes in federal nutrient management programs
    Each Conservation District has a local workgroup that is made up of key conservation partnership representatives, inclusive of state, federal and local reps., which convene annually to prioritize, rank and make recommendations to USDA and State partners for targeted program funding. WV has and continues to develop priority watersheds through Bay Program and Section 319 funding. This allows watershed based planning and grant procurement. Selection has been based upon several ranking factors ranging from, but not limited to, water quality data, opportunities for BMP implementation, existence of a local TMDL, population growth, watershed group activity and nitrogen delivery factor.
  - Build and maintain infrastructure to advance adaptive management of nutrients through cost share programs and partner contributions
    WV has a State Technical Advisory Committee that meets to address these issues as well as the local groups and Conservation Districts. These entities have the power to, and in fact do utilize adaptive management for program funding – both state and federal.
  - Develop a training program for farm advisors on how to implement adaptive management programming
    WV has a training program in place for nutrient management planners as well as technical advisory staff with continuing education courses offered frequently. This allows planners to be updated on the newest scientific advancements. WVU Extension leads the training program with advanced agricultural training opportunities and updates to the farming/agricultural production community.

- Adopt a strategically targeted approach to wetlands and buffers that is driven by careful analysis of nutrient loading, hydrology, and other critical landscape characteristics **We believe we currently address many critical variables, to the extent practical, and tempered by landowner willingness, when planning projects in priority watersheds.**
  - Advance strategic approach that takes into account landscape controls on filter effectiveness
  - Prioritize water quality improvement in funding decisions

- Make outreach and technical assistance a top priority and provide enough resources to put the "boots on the ground" needed to achieve real results **We believe we are well on our way in this process, with the recent hiring of several staff devoted to nutrient management planning and other types of technical assistance, after years of learning that this would be needed**
- Agency secretaries of relevant state agencies bring together key people for a meeting or a series of meetings to develop bold new ideas to get technical assistance to the farmers
- Agencies build and support a workgroup specifically focused on advancing and implementing the technical assistance strategy

- Develop a stronger program for tracking and evaluating the effectiveness of practice implementation and impact **We are doing this; See WV's general response**
- Identify existing and further develop new cost effective metrics for real time evaluation of practice effectiveness **See WV's general response.**
- Dedicate a funding stream and staffing resources for verification of voluntary and mandatory practice implementation **We are spending money on new staffing resources. See WV's general response**

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West Virginia must commit to taking specific actions that will ensure achievement of the Bay TMDL and be able to assess the effectiveness and compliance with the voluntary programs to reduce pollution discharges from its nonpoint sources. Specific suggestions include:

- NPDES Permitting –include a more thorough capacity and gap analysis and establish goals for ensuring all facilities have the required and up-to-date permits that are consistent with the TMDL
- Enforcement of NPDES Permits –include complete enforcement data, such as: the number of physical onsite inspections per sector; the number of violations and penalty actions and the amount of penalties assessed during the year; a description of the enforcement activities by local governments with delegated authority; and a clearer picture of enforcement resources
- Monitoring and Verifying Voluntary Practices by Nonpoint Sources – should disclose the acreage currently under voluntary management or best management practices and the method of ensuring compliance with funding terms. As a contingency, the state should consider transitioning some voluntary practices into mandatory practices
- Contingencies – include contingencies that cover each sector and should specify when and how these contingencies will be implemented
- CAFO- provide an estimate for the date of EPA approval of the CAFO regulation and a timeline for ensuring that all of the facilities receive permits that are consistent with the Bay TMDL. WV should also provide more information regarding its CAFO compliance and enforcement program, including inspection frequency, compliance rates, enforcement activities and penalties.

- Stormwater – address gaps about the authorities of local authorities to verify stormwater discharges and compliance with NPDES permits and address how you will deal with the personnel and funding gaps. Also provide a more detailed review of the stormwater program and how it will substantively be used to meet the stormwater allocations in the Bay TMDL

Air Deposition –disclose a list of all major sources of pollutants, the control authorities and the estimates of the funding and personnel gap along with a plan and deadlines to fill the gap – **WV does not anticipate imposing any more stringent controls on sources of air pollution beyond those required under the Clean Air Act, therefore, we did not estimate additional reductions from air.**

See WV's general response. ***Read WV WIP – it talks about permitting, compliance assessment and enforcement, and contingencies for increased regulation of urban stormwater.***

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Your press release regarding public comment on the Chesapeake Bay TMDL is incomplete in its listing of West Virginia counties within Chesapeake Bay watersheds. About 25% of Monroe County's waters flow into the Chesapeake Bay by way of the James River. I didn't know if this was simply an omission in your press release, or if the WV DEP has also overlooked this situation.

This point is currently being addressed. West Virginia initially thought that the Potomac reductions would be enough to "satisfy" the requirements of the Bay TMDL, but EPA disagrees and says that West Virginia must reduce loads in its portion of the James by approximately:
Nitrogen – 9,000 lbs.
Phosphorus - 2,000 lbs.
Sediment – 4,000 tons
PP. 13-14, and 102-103 of the Phase I WIP now discuss the James Watershed. WV will work with EPA to address these loads in the Phase II WIP.

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*The views expresses in this document represent the personal views of the signatories marked with an * and not necessarily the views of their employees or organization.

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Secretary Maryland DNR (1983 -1995)
U.S. Senator (1965-1971)
Maryland State Senator (1983-1995)
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We urge the inclusion of these measures and requirements in state WIPs to meet the reasonable assurances requirements as EPA reviews the WIPs under the TMDL process. We believe these changes are essential to insure the Bay's restoration. We all firmly believe that the 25 items outlined in our comments are essential if there is to be any reasonable assurance that the nutrient and sediment reductions necessary to restore the Chesapeake Bay will be achieved under the current planned timelines.

Better Controls Necessary for Agricultural Pollutants

- The EPA should require each state's WIP to include requirements to implement measures, including BMPs, throughout each waterway segment in your state of the 92 designated by the EPA for the entire Bay watershed. These are necessary to achieve the nutrient and sediment TMDLs by a date certain to meet "reasonable assurance" expectations. Each state's WIP should include detailed sanctions for any source that fails to meet the TMDL limits and two-year milestones. The primary proposed Federal punitive measure to address failure to achieve two-year milestones appears to be a further reduction in the waste load allocation for point sources. Point source controls are expected to achieve their allotted nutrient reductions by about 2012. It appears illogical and unfair to punish this sector if it meets the targeted caps while leaving nonpoint sources without any realistic and certain sanctions. It would be much more effective for the EPA and each state to develop regulatory sanctions against nonpoint sources with assured enforcement.

- Reducing nonpoint source loads from agricultural operations, including any necessary new regulations and better enforcement, should be part of each state's WIP. These must include readily enforceable mechanisms. The required "reasonable assurances" that the states will meet nonpoint source load limits dictate strong, verifiable measures to reduce agricultural nutrients and sediment loads. Assuring monitoring efforts at a reasonable scale for nonpoint source pollutants from agriculture is essential. The monitoring results should be available to the public. The implementation of Best Management Practices (BMPs) needs to be publicly reported at a parcel scale.
- Discrete, performance-based targets for nutrient and sediment reductions from all nonpoint sources to improve water quality in each of the 92 waterway segments, including all BMPs, should be required in each WIP, and assessments of those BMPs and reduction targets should be required to be conducted by independent third-party entities to assure effectiveness and proper implementation.
- A significant expansion of the CAFO designation to include most all but the smallest AFOs should be implemented and EPA should include all agricultural lands receiving manures from any AFO as part of the regulated entity/activity subject to CWA permits. It is equally important that assessment and accountability of CAFOs be increased. Current state programs do not provide adequate assurance that the CAFO permits, particularly related to land application, are being enforced. Enforcement must be assured.
- The EPA should adopt requirements for all land disposal of animal waste/manure that parallel Maryland's regulations under the Maryland Department of Environment for the land disposal of human sludge from advanced wastewater treatment facilities. These requirements should include the provisions already extant for human sludge that require the incorporation of all animal waste/manure into soils within 24 hours of application on land, soil tests to assure the land is not phosphorus saturated, and that prohibit application on steep slopes, highly erodible soils, frozen ground, and in riparian buffers of up to 200'. See the Maryland human sludge disposal regulations at COMAR 26.04.06.09. State WIPs should reflect these changes.
- The EPA should require that all state WIPs require that on any agricultural lands that receive human sludge and/or animal waste/manure, cover crops should be mandatory for a minimum of one year after application. Even with the use of cover crops, sludge and animal waste/manure should be required to be injected or incorporated into soils within 24 hours of application. Further, the practice of human sludge or animal waste/manure application to fields with excessive phosphorus levels must be stopped. The WIP should require reducing phosphorus levels to agronomic requirements and soil tests before all applications of human sludge and/or animal waste/manure. These latter measures must be required to assure that phosphorus is not applied where not needed.
- Greater accountability and verification of performance of agricultural BMPs is essential and the EPA must require this in state WIPs.
- The EPA and each state WIP should mandate whole-farm water quality plans for all agricultural lands including the next generation of nutrient management, with clear targets, a reasonable

implementation schedule, progress checks, and enforcement. This is critical to restoring the Bay and should be mandatory.

Necessary Measures for Developed Land Pollutants to be included in WIPs

- While reducing agricultural nutrients and sediment loadings may be the immediate challenge as farm pollutants are the greatest source of loadings and the most cost-effective to reduce, offsetting the effects of population growth and development by 100% is essential to maintaining any progress made by other sectors. The EPA should act to include measures to expand MS4 jurisdiction over more developed lands, better septic system requirements, and improved growth control measures as these are essential and the EPA should require that these measures be included in each state WIP along with a requirement for completely offsetting growth related loads elsewhere in each of the 92 waterway segments under the TMDL in each state.
- A requirement is critically needed for no net increases in stormwater discharge rate, volume, and pollutants for all new development for a 5-year storm. Current state stormwater laws clearly do not accomplish this. The EPA, both through the MS4 permitting process and requirements for inclusion in each state's WIP, should assure that each state requires and enforces a no net increase in rate, volume, and pollutant loads from all new development. This will require mandatory on-site containment through environmental site design.
- EPAS's TMDL process and review of WIPs should assure that measures are included for improved water quality retrofit requirements for MS4 permits and for all developed lands including road construction or reconstruction, and all such MS4 permits should be required to meet the no net increase in rate, volume, and pollutants rule. For re-development, to the maximum extent practicable, no net increase in rate, volume, or pollutants should be required for a 5-year storm and offsets required where this no net increase the requirement cannot be met. Each WIP must include funding mechanisms to provide reasonable assurances that such urban retrofit will be accomplished.
- The EPA should assure that each state's WIP includes provisions for improved water quality through systematic urban retrofits of large areas of developed lands such as shopping centers, large industrial sites, and other large impervious surfaced areas in private ownership, with mandatory measures and timelines for such retrofits.
- Measures to reduce or eliminate fertilizer usage on residential lawns, golf courses, and public lands should be included in state's WIPs, including measures to prohibit phosphorus in fertilizers sold for maintenance of such properties.
- The EPA should ensure that all federal and state facilities and public lands in the watershed undertake stormwater retrofits to meet TMDL allocations and state 2-year milestones. The federal and state facilities and lands should follow guidance developed by EPA pursuant to Section 438 of the Energy Independence and Security Act and Section 502 of Chesapeake Bay Executive Order (13508). All new government construction should meet a requirement for no net increase in rate, volume, or pollutants for a 5-year storm.

Forest land Protection and Increased Forested Buffers should be in WIPs

- The EPA should encourage state WIPs to require a no net loss of forest coverage in each Bay watershed of the 92 waterway segments to achieve the nutrient and sediment TMDLs by a date certain to meet "reasonable assurance" expectations. WIPs also should contain detailed measures to expand forested buffer coverage to at least 85% of all the shores of the Bay and its tributaries.
- State's WIPs should target federal and state funds from land preservation programs for the fee simple or easement purchase of sensitive lands such as forests and wetlands on private lands and farm lands, especially those bordering the Bay and its rivers. Acquisitions should take into consideration State Wildlife Action Plans and Green Infrastructure maps that have been updated to reflect the implications of climate change and expected sea level rise.

WIPs Should Include Septic Systems Nutrient Reduction Requirements – Septic systems are not a significant part of the problem in WV.

- WIPs must include provisions that require all new and replacement on-site waste disposal systems (OSWDS) in the Chesapeake Bay watershed to be systems that utilize the best available technology (BAT) for nitrogen removal.
- Each state WIP should include requirements for implementation of a mandatory septic inspection program for existing systems, with a requirement for a best available technology (BAT) system for nitrogen removal in failing systems.
- Each WIP should contain requirements to evaluate existing clusters of septic systems for connection to centralized sewage treatment that uses Enhanced Nutrient Removal (ENR).

Air Emissions Need to be Reduced Through WIPs –WV does not anticipate imposing any more stringent controls on sources of air pollution beyond those required under the Clean Air Act, therefore, we did not estimate additional reductions from air.

The EPA should act to better control air emissions by better regulating and enforcing emission controls from all sources and include similar provisions for each state.

- All new stationary sources of air emissions in each Bay state that contribute increased nitrogen to the Bay should be offset and each state WIP must include provisions for accomplishing this offset.

Better Controls Necessary To Reduce Nutrients From WWTPS in WIPs

West Virginia's WIP meets caps with the management actions described for WWTPs and CSOs

- All Wastewater Treatment Plants (WWTPs) should be required to meet nutrient discharge limits of no more than 3.0 mg/l Nitrogen and 0.3 mg/l Phosphorus and these should be included in WIPs.
- Each state WIP should allocate WWTP pollution loads based on 2010 wastewater flows, assuming a concentration of 3.0 mg/l of nitrogen and 0.3 mg/l of phosphorus. Any increased nitrogen or phosphorus loads with flows beyond 2010 actual flow levels must be offset with equal or greater reductions from other sources.

- Each WIP must aggressively address and fund infrastructure upgrades to prevent and treat combined sewer overflows.
- The EPA should act to adopt measures to assure that existing Clean Water Act and other water quality laws are fully enforced, including at all WWTPs, and each WIP should adopt necessary measures to assure such enforcement.

This comment is in reference to EPA actions and was forwarded to EPA.
See WV's general response. Implementing all of the suggestions listed here would require a tremendous level of effort from all sectors at the same time. The WIP development process was designed to give each jurisdiction the chance to craft a plan that was realistic for our state, yet still met the expectations of EPA.

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I attended the meeting in Martinsburg and have a few question and points to express:

- Agriculture is purported as the number one polluter. 85% of the land is undeveloped and considered agriculture but is park land, federal property, or state wilderness. There are more deer than people, pets and domestic livestock combined.
- How can a farmer deal with atmospheric nitrogen after rain and snow events?
- Farmers have implemented BMPs on their own that will not count and they may even be penalized because those around them have done nothing so far or [sic].
- How do you intend to realistically set standards that will stop growth of residents and business without adding to current economic woes?
- Water monitoring of tributaries to the Shenandoah (Bullskin, Evitts Run and one other) which only run through WV for a few miles during drought conditions is not a scientifically sound way to set standards.
- Jefferson County commissioners are dead set to stop growth and this will be tough to overcome and get things moving in a positive direction.
- The timing for this mandated exercise is not scheduled to have all facts and plans finalized until the end of next year's first quarter, so why is the arbitrary cut off set for this month?
- By the time all this comes to pass with 100% compliance all of the current and relevant parties will be retired or dead and the government will be out of money.

The West Virginia Agriculture professionals are working with the farming community to address some of these issues in the Phase II WIP.

At this time, West Virginia's WIP calls for standard agricultural Best Management Practices, and does not focus on reducing atmospheric nitrogen specifically.

It is true that West Virginia's farmers have implemented many BMPs in the Bay drainage and have been given no credit in the model; however, the West Virginia Department of Agriculture is fully

committed to documenting as many of these practices as possible to receive the proper credit for Nutrient and Sediment reductions that have been made.
As far as the Chesapeake Bay Program goes, West Virginia is not focused on monitoring water quality to develop "standards". Water quality monitoring programs in the eastern panhandle have multiple objectives. WVDEP monitors water quality to look for specific impairments such as from fecal coliform or impairments relating to biological processes. WVDA monitors concentrations of nutrients and sediments in streams to better understand long term trends in water quality. USGS is contracted to monitor loads of nutrients and sediments that are delivered annually to the Chesapeake Bay. These annual loadings are quite accurate. Where we lose the accuracy, and strive to improve, is in estimating contributions of nutrients and sediment from individual land uses throughout the watershed.

Regarding your last comment, we believe local waters are already improving, in many cases, due to better practices in their watersheds over the last several years. It is this trend that we strive to increase and document.

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As a member of the Chesapeake Bay Blue Ribbon Finance Panel, I am quite dismayed at the direction being taken by the EPA in regards to the proposed requirements. Millions and millions of dollars have been spent on committees and expenses with little or no positive outcome. Time and time again it has been pointed out that improper modeling was used to reach the proposed limits; with no funding mechanisms in place to assist individuals or city/county governments to meet these requirements. At last count, WV alone needs 2 billion dollars for water/wastewater projects. Targeting one area of the State is not a viable option to any State Legislature. It appears the only option left for the States is to file a collective suit against these proposals and use valuable resources to stop this madness. For a federal agency to state time and again, they don't care how we reach these limits, do it or we will impose backstops to make sure you do is not cooperation, it is tyranny and it needs to be addressed.
This comment is in reference to the TMDL and was forwarded to EPA.

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I had the opportunity to read the Summary EPA Evaluation of the Phase I Pennsylvania Draft WIP and would like to share with you the progress which Algae Producers of America and its partner organizations have achieved in realizing the level of nutrient reductions are required.

Algae Producers Inc. has developed algae based technology to reduce nutrients in both wastewater treatment facilities and industrial facilities and feel they have results that clearly demonstrate the ability to exceed current capabilities of Enhanced Nutrient Reduction (ENR) technology.
West Virginia acknowledges receipt of the information provided.

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Agriculture Retailers Association
American Farm Bureau Federation
CropLife America
Delaware Maryland Agribusiness Association
Illinois Fertilizer & Chemical Association
Missouri Agribusiness Association
Mosaic
National Alliance of Forest Owners
National Association of Wheat Growers
National Cattlemen's Beef Association
National Corn Growers Association
National Council of Farmers Cooperatives
National Pork Producers Council
National Potato Council
National Turkey Federation
South Dakota Agri-Bussiness Association
South East Dairy Farmers Association
The Fertilizer Institute
U.S. Cattlemen's Association
U.S. Poultry & Egg Association
United Egg Producers
Wyoming Ag-Business Association

The undersigned, or their members, own and operate facilities that would be directly affected by the WV Draft WIP. In addition, the undersigned have a direct interest in any precedents that may be established by West Virginia and the U.S. Environmental Protection Agency that may have national implications with respect to federal control over TMDLs and TMDL implementation.

We believe that EPA's threat to retaliate against watershed jurisdictions that do not develop WIPs that conform to EPA's expectations exceed EPA's authority under the Clean Water Act (CWA). We urge the state of West Virginia to question EPA's claim of authority over the Chesapeake Bay TMDL and state WIP and to use its authority to develop cost-effective and practicable measures to make further progress toward improving water quality in the Chesapeake Bay.

EPA lacks authority to approve, disapprove, or unilaterally change WIPs

Section 303 of the Clean Water Act Does Not Give EPA TMDL Implementation Authority

- The 1997 TMDL guidance does call for "reasonable assurances" that load allocations will be met if relied upon to establish point source wasteload allocations, and encourages submission of implementation plans to EPA. However the 1997 guidance does not purport to make implementation plans subject to EPA approval or to give EPA authority to require reasonable assurances. This interpretation of the CWA has been affirmed by the courts. Thus, EPA has no authority to approve, disapprove, or change the state WIPs.

Section 117 of the Clean Water Act Does Not Authorize EPA Control Over TMDL Implementation

- EPA appears to be relying on section 117 (g) of the Clean Water Act as its source of authority to mandate the elements of the state implementation plans for a Chesapeake Bay TMDL.
- However, in enacting 117 (g) Congress did not provide the federal government with regulatory authority to achieve the goals listed in 117 (g).

An Executive Order Does Not Grant EPA Authority to Approve State WIPs

- EPA cites Executive Order 13508 as authority to dictate the terms of state WIPs
- It would be a violation of Separation of Powers for the president to grant the Executive Branch any authority through an Executive Order or otherwise

EPA Cannot Require States To Take Specific Implementation Measures

- Nothing in the CWA or EPA regulations gives EPA the authority to use EPA's permitting regulations to compel state regulatory action.
- In fact, such authority would violate the 10th Amendment to the U.S. Constitution
- The Court held that Congress may not "commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program

EPA Threats of Consequences Overstate EPA's Authority

- Congress gave the states not EPA primary authority over establishment and implementation of water quality standards under CWA section 303
- If EPA finds that a state is not administering the CWA permitting program properly, EPA may withdraw state authorization to administer the CWA permitting program
- EPA intends to impose residual designation authority on West Virginia by designating animal feeding operations as regulated concentrated animal feeding operations. This authority governed by 40 C.F.R. 122.23 (c) is limited. First, the AFO must actually discharge pollutants. Second, either the state or EPA must make a determination that the particular AFO "is a significant contributor of pollutants to the waters of the United States". Third, if a state is authorized to carry out the CWA permitting (which includes every watershed jurisdiction except for DC) then the Regional Administrator may designate an AFO a CAFO only if "the Regional Administrator has determined one or more pollutants in the AFO's discharge in contributing to an impairment of a downstream or adjacent Sate or Indian Country water that is impaired for that pollutant".
- For sources that are already subject to the CWA permitting program, and that require a new permit or a permit renewal, EPA does not have the authority to object to a permit "as being outside the guidelines and requirements of this Act." 33 U.S.C. 1342 (d) (2). Grounds for objecting to a state permit are found in C.F.R. 123.44. Disagreeing with a state WIP is not one of the specific grounds.
- EPA has no authority to require net improvement offsets for new or increased discharges. The only way for EPA to carry out this threat is to object to a state-issued permit and then claim that it is inconsistent with the CWA.
- EPA is requiring net improvement offsets
    - The CWA requires that a TMDL be set at a level necessary to achieve applicable water quality standards. 33 U.S.C. 1313(d) and 33 U.S.C. 1313(b)(1)(C). The statute does not limit state's discretion to calculate and assign wasteload and load allocations within the TMDL. However it does not follow that EPA has the same discretion.
    - Moreover, to threaten unreasonable and unnecessary point source limits in an effort to force regulation of nonpoint sources and the adoption of land use controls to EPA's

liking offends the fundamental policy of the CWA favoring state primacy over nonpoint sources and land use decision-making.

- EPA is requiring finer scale wasteload allocations and load allocations in the Chesapeake Bay TMDL than those proposed by watershed jurisdictions in their WIPs. By setting wasteload allocations for individual homes and by proposing fine-scale load allocations, EPA has overstepped its bounds and is attempting to implement a TMDL.
- EPA is threatening increased and targeted federal enforcement in the watershed. EPA has prosecutorial discretion to determine what source it targets for enforcement against actual violations of the CWA. EPA does not have authority to coerce state action through unfounded enforcement measures
- EPA is threatening to condition or redirect grants. EPA can only give grants to states pursuant to an authorization by Congress. Many grants are allocated on a base of a statutory or regulatory formula such as title VI state revolving loan fund grants and section 106 program implementation grant. EPA must implement Congressional appropriations as Congress intends and lacks authority to redirect appropriated monies to carry out its own agenda.
- EPA is threatening to promulgate federal nutrient criteria. EPA's authority to issue federal numeric nutrient standards is limited. Section 303(c) (4) of the CWA authorizes EPA to issue a new or revised water quality standard in a state only if EPA determines that a new or revised state standard in not consistent with the applicable requirements of the Act, or if EPA determines that a new or revised standard is necessary to meet the requirements of the Act 33 U.S.C. 1313(c) (4).

The CWA does not Provide EPA with Authority to Establish the Draft TMDL

- EPA has backstop authority to establish a TMDL when a state fails to act or establishes an invalid TMDL
- EPA puts forward the argument that section 117 (g) authorizes EPA- established Chesapeake Bay TMDL because that provision directs EPA to "ensure that management plans are developed and implementation is begun." Draft TMDL at 1-13. EPA argues that "the Chesapeake Bay TMDL is such an implementation plan." This argument ignores principles of statutory interpretations.
- The CWA does not provide any federal authority to regulate nonpoint sources of pollutants. While sections of the CWA call for plans to address nonpoint source pollution, EPA is not given backstop authority.

This comment is in reference to the TMDL and was forwarded to EPA.

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Dominion's interest is primarily with the evaluation of the West Virginia WIP performed by the United States Environmental Protection Agency (EPA) and the potential imposition of EPA federal backstops on non-significant facilities owned by Dominion. Dominion owns and operates the following non-significant facilities in West Virginia that could be affected by either the WV WIP and/or the EPA Chesapeake Bay TMDL: Mt Storm Power Station, and North Branch Power Station.

I. EPA Proposed Backstop WLAs

Should WV produce a revised WIP that is unsatisfactory to the EPA, the EPA proposes the following Waste Load Allocations (WLAs) for non-significant facilities in West Virginia (Table Q-2 of the Draft TMDL).

Facility	Annual Nitrogen WLA (lbs)	Annual Phosphorus WLA (lbs)	Annual Sediment WLA (mil lbs)
Virginia Electric & Power – Mt Storm Power Station	0	0	0
VEPCO – Mt Storm Flyash Disposal	0	0	0.000007
VEPCO – North Branch Power Station	0	0	0.00038

Upon inquiry to the EPA, however, it was determined on November 1, 2010, that the backstop numbers listed in Table Q-2 for non-significant Dominion facilities were incorrect. The EPA has provided the following corrected WLAs:

Facility	Annual Nitrogen WLA (lbs)	Annual Phosphorus WLA (lbs)	Annual Sediment WLA (mil lbs)
Virginia Electric & Power – Mt Storm Power Station	0	0	0
VEPCO – Mt Storm Flyash Disposal	0.310988768	0.010385902	0.0024098
VEPCO – North Branch Power Station	2.685577931	0.089519264	0.0040284

We appreciate EPA's willingness to reexamine the backstop numbers for our facilities and their gracious provisions of corrected numbers. However, we are concerned that both the original and the corrected backstop numbers do not comport with actual loadings at these facilities. If the backstop moves forward, we encourage West Virginia and the EPA to develop WLAs that represent the effluent characteristics and recognize the nature of the operations at each facility. New WLAs that are incongruous with actual discharges, loadings, and treatment capabilities may ultimately result in WLAs that fail to ensure the maintenance of water quality standards.

For example, the corrected full backstop numbers listed above propose nitrogen, phosphorus and sediment WLAs of 0.00 for the Mt Storm Power Station. It appears that the input deck used to calculate these WLAs relied upon incorrect flow data. Prior to November 2009, the Mt Storm Power Station did

not have instrumentation to measure flow at Outfall 001. Since the installation of flow measurement instrumentation, flows from Outfall 001 have ranged from a monthly average of 0.55 MGD to as much as a monthly average of 152 MGD. At this time Dominion has only one year of measured flow data at this site and is concerned that the figures shown above may not reflect future operations and flows. If the federal backstops move forward, we hope that there will be an opportunity to gather more accurate flow data before establishing WLAs for nutrient and sediment loadings at the Mt Storm facility.

Dominion is also concerned that stale data aggregated from sources other than the permittee have been employed to develop the non-significant backstops. EPA recognizes that most non-significant facilities do not have monitoring data for nutrients and sediment, since such facilities have not been required to monitor for these effluent constituents. Thus, when developing the draft TMDL backstops for non-significant facilities, the EPA relied upon estimates from Tetra Tech based on Typical Pollutant Concentrations for non-significant industrial plants.

The aggregation of data from across an industry or industry sector may produce illogical results when applied to an individual facility, especially where individual facilities within an industry can very different effluent characteristics. In such a case, the employment of typical pollutant concentrations for an industry may produce permit limits that fail to sufficiently recognize and protect water quality.

II. WLAs Proposed in the West Virginia WIP

In Appendix B.2. of the West Virginia WIP, the following WLAs are proposed for the Grant County, which includes Dominion North Branch Power Plant:

Group	**Annual Nitrogen WLA (lbs)**	**Annual Phosphorus WLA (lbs)**
Grant County	82.2	230.6

According to Section 6E of the WV WIP, the grouped WLAs listed above were developed to allow continued permitting of existing non-significant sources without pollutant reductions. However, we have been unable to make any determinations on the appropriateness of the group WLA proposed due to lack of sufficient, representative monitoring data for nitrogen, phosphorus, sediment and flow at the North Branch Power Station. We, therefore support monitoring for nitrogen, phosphorus, sediment and flow at non-significant facilities and permission to submit data prior to the establishment of non-significant discharger WLAs.

We appreciate the opportunity to comment on the WV WIP and EPA draft TMDL as applicable. We understand that at this stage in the restoration of the Chesapeake Bay, challenging decisions abound. We applaud the efforts of WV to develop an equitable approach to restore the ecological and economic vibrancy of the Chesapeake Bay. However, we urge WV to maintain equity within its next iteration of the WV WIP, and we request that WV work to avoid the disparate impacts of EPA backstops.

Based upon the improvements contained in WV's revised Phase 1 WIP, EPA did not impose the threatened backstop allocations to significant wastewater facilities. That notwithstanding, the TMDL's failure to grant specific wasteload allocations for the Mt. Storm facility is a significant mistake and is inconsistent with the nitrogen and phosphorus allocations provided in WIP Appendix B.1. The allocations provided for Permit No. WV0005525 were intended to be implemented at the outlet of Mt. Storm Lake and account for all permitted facilities discharging into or upstream of the Lake. DEP has made EPA made aware of the issue and has requested guidance for resolution in the interim period prior to Phase 2 WIP development.

In the Phase 1 WIP, WV captured the model's representation of the existing Lake outlet and did not prescribe reductions of the loadings. In Phase 2, WV will reexamine the basis for the initial representation and refine as necessary. Based upon the model's extremely low delivery factors for the location of the Lake, WV does not intend to require pollutant reductions. In the re-evaluation effort, WV will consult and coordinate with the permittee to determine the most accurate and practical representation.

Nonsignificant industrial facilities with process wastewater discharges contributing non-negligible nitrogen and phosphorus loadings and/or discharges from sewage treatment plants are granted wasteload allocations as identified in WIP Appendix B.2. The North Branch Power Station was granted a wasteload allocation for the sewage treatment facility associated with internal outlet 101. As displayed in columns D-F, the component allocation was based upon a design flow of 0.0015 MGD and the default nitrogen and phosphorus concentration of 18 mg/l and 3 mg/l, respectively.

WV's Phase 1 WIP intended additional allocations for the stormwater discharges regulated by WV/NPDES permits for industrial facilities. As mentioned above, industrial stormwater discharges into or above Mount Storm Lake were to be reflected in the "wastewater" allocation for the Lake outlet. Otherwise, the WIP provides allocations for industrial stormwater discharges equal to the 2010 No Action loadings associated with the pervious and impervious areas displayed in Appendix B.3. WV has rationalized that the characteristics of the industrial stormwater areas are consistent with the model representation of urban pervious and impervious landuses due to GPP, SWPP, and SPCC permit requirements. Implementation is proposed by maintenance of allocated areas grouped at the county scale. Appendix B.3 provides area allowances of 495 pervious acres and 12 impervious acres for the North Branch Power Station. The loadings associated with industrial stormwater discharges should be contained within the TMDL's aggregate wasteload allocation for "regulated stormwater". The TMDL lacks clarity for the division of the regulated stormwater aggregate allocation and WV will coordinate with EPA to improve this in the Phase 2 TMDL revision.